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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

PETITION NOT PRINTED
RESPONSE NOT PRINTED

No. 203

DENNIS COUNCLE McGAUTHA,

Petitioner,

v.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of California is reported in 70 Cal.2d 770, 76 Cal. Rptr. 434, 452 P.2d 650. There was no other opinion in the cause.

Jurisdiction

1. The jurisdiction of this Court is invoked on the ground that there is brought here for review a final judgment of the Supreme Court of California, the highest court of the State in which a decision could be had, rendered in a cause in which the validity of a State statute was drawn in question on the ground of its being repugnant to the Constitution of the United States; and in which there was drawn in question a right, privilege and immunity claimed by the petitioner under the Constitution of the United States. [A. 249, 265.]

2. The statutory provision upon which that jurisdiction rests is 28 U.S. Code, sec. 1257(3).

3. The time factors upon which that jurisdiction rests are: The date of the judgment to be reviewed, as well as the time of filing and entry, was April 14, 1969. A timely petition for rehearing was filed on April 29, 1969, and denied, without opinion, on May 14, 1969. The judgment, therefore, became final on May 14, 1969. [A. 249, 266.] The petition for certiorari was filed on June 21, 1969, and granted on June 1, 1970.

Constitutional Provision and Statute Involved

1. The constitutional provision here involved is section 1 of the Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The statute involved is the Penal Code of the State of California, sections 190 and 190.1, as amended. It may be found in the official edition, as amended in 1957, in California Statutes, 1957, vol. 2, chap. 1968, p. 3509; and, as amended in 1959, in California Statutes, 1959, vol. 1, chap. 738, p. 2727. At the time of the trial hereof, it read and still reads as follows:

> "§190. Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.[1]
>
> "§190.1. The guilt or innocence of every person charged with an offense for which the penalty is in

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[1] At all times material here, murder in the first degree and murder in the second degree were respectively defined in Cal. Penal Code, as follows:

> "§187. Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * *
>
> "§189. All murder which is perpetrated by means of a bomb, poison, lying in wait, torture, or by another kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [lewd or lascivious acts upon the body of a child under the age of 14 years], is murder in the first degree; and all other kinds of murders are of the second degree."

At the times material here "robbery" was defined as follows:

> "§211. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

All section references are to the Penal Code of California, of which there is no official edition, but which, in either West's or Deering's annotated edition, is generally accepted by the Courts and Bar of California as authentic.

the alternative death or imprisonment for life shall first be determined, without a finding as to penalty.[2] If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty.

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[2]There are four crimes in California, in addition to first-degree murder, for which the punishment is in the alternative death or life imprisonment. These are: Kidnapping with bodily harm [*Cal. Penal Code*, sec. 209]; train wrecking [*Cal. Penal Code*, sec. 219]; sabotage of war or defense effort, causing death or great bodily injury [*Cal. Military and Vet. Code*, secs. 1670, 1672(a)]; and assault with a deadly weapon by a life prisoner [*Cal. Penal Code*, sec. 4500]. There are two other crimes—treason and procurement of the conviction and execution of an innocent person by perjury or subornation of perjury—for which the penalty is death, without the alternative of life imprisonment. [*Cal. Penal Code*, secs. 37, 128.]

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

Question Presented

Does California's procedure, which allows capital trial juries absolute discretion, uncontrolled by standards, directions or guidelines of any kind, to impose either the penalty of death or imprisonment for life upon a defendant convicted of murder in the first degree, deny to that defendant due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

1. The Crime and Sentence

On February 14, 1967 two men, both armed and ultimately identified as petitioner McGautha and his co-defendant below, William Rodney Wilkinson, robbed a small market in Los Angeles, California. [Rep. Tr., p. 105, line 1, to p. 109, line 11[3].] In the course of the robbery a shot

[3]Because the question here relates solely to the penalty imposed, only the evidence at the penalty phase of the trial has been printed in the Appendix. However, to put the matter of penalty in its context of the crime for which it was imposed, we briefly summarize the circumstances of the crime. References to the record, in that connection, are made, pursuant to Rule 26, to the Reporter's Transcript of the trial, which is here in four volumes. The references are identified by the abbreviation "Rep. Tr."

was fired by one of the two men, but which one the evidence leaves in conflict. That shot killed Benjamin Smetana, husband of the market owner. [Rep. Tr., p. 116, line 17, to p. 118, line 20; p. 362, line 13, to p. 364, line 8; p. 385, lines 1-26; p. 394, lines 1-15.]

In due course, the two men were apprehended and charged by information with one count of murder in the first degree and two counts of armed robbery. [A. 1-4.] They were then put upon their trial before a jury. [A. 6-8, 11.] The trial, as required in California in cases in which the penalty may be either death or life imprisonment [*Cal. Penal Code*, sec. 190.1], was held in two stages, with separate verdicts on guilt and penalty. In the first stage the jury returned a verdict finding both men guilty of murder in the first degree and armed robbery. [A. 11-14. See, also, note 24, p. 34, *infra*.]

The second stage of the trial—choice of the penalty to be imposed for the murder—was then had before the same jury. [A. 15-16, 30.] After the taking of additional evidence [see, section 2 of this Statement of the Case, *infra*] the jury were instructed that a person guilty of murder in the first degree "shall suffer death or confinement in the state prison for life, at the discretion of the jury . . ."; and, that, "beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury . . .[4] [A. 222-223.] The jury, by their verdict, ordered

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Two of the four volumes relate to voir dire examination of jurors and are so identified on their covers. No references to those two volumes are made in this brief.

[4]The instruction given the jury was strictly in accord with the law of California. [See, the cases cited in section 3 of this Statement of the Case, *infra*.] It is, indeed, the standard instruction upon the subject, colloquially identified as "CALJIC 8.80." It comes from a compilation of approved instructions to be used in criminal cases, prepared by a committee of the Bench and Bar. [See, *California Jury Instructions, Criminal*, 3d. ed. (West Pub. Co. 1970), p. 257; also, p. vii.]

that McGautha be put to death, but that Wilkinson be imprisoned for life. [A. 231-232.]

2. The Evidence and Instructions at the Penalty Phase of the Trial

First: Each of the defendants–they had not testified in the guilt phase of the trial–took the stand in the penalty phase. No testimony in behalf of McGautha was offered other than his own. [A. 159-194.] Wilkinson produced the testimony of a number of witnesses; friends and the like, who testified to his work habits, church attendance and similar matters. [A. 82-83.] The prosecution added nothing except a file of documents from Texas [A. 81], among which were records of McGautha's prior convictions. There were four of them charged in the information [A. 3-4], and admitted by him. [A. 35-36.]

A good part of the penalty phase of the trial consisted of an exploration of the conflicting testimony of the two defendants about which one of them had fired the fatal shot.[5] The fact was immaterial to the question of their legal responsibility for the crime charged.[6]

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[5] According to McGautha, he did not fire, but Wilkinson did; at the time of the shot he (McGautha) was holding a customer, using both hands in the process. [A. 159-161] Wilkinson, on the other hand, testified, in effect, that not he, but McGautha fired. [A. 98-99, 119-120.] Eye-witness testimony, at the guilt phase of the trial–the evidence at which the jury were instructed to consider in the penalty phase [A. 221]–corroborated McGautha. [Rep. Tr., p. 105, line 1, to p. 110, line 2; p. 112, line 9, to p. 119, line 6.] Other evidence, indirect in nature, and some confused and contradictory admissions by McGautha, tended to support Wilkinson's version. [Rep. Tr., p. 35, lines 7-9; p. 67, line 16 to p. 68, line 5; p. 112, line 9 to p. 116, line 9; p. 202, line 6, to p. 203, line 4; p. 204, line 11, to p. 205, line 7; p. 216, line 16, to p. 221, line 10; p. 325, line 21, to p. 326, line 13; p. 345, line 13, to p. 351, line 3.]

[6] The crime was "felony murder" [see, *Cal. Penal Code*, sec. 189; *People v. Lookadoo*, 66 Cal.2d 307, 314, 57 Cal. Rptr. 608, 612-613, 425 P.2d 208, 212-213 (1967)], of which each of them was equally

Apart from his description of the events in the market, McGautha's testimony was brief. He was born February 2, 1926, in New Orleans, La. His parents separated when he was four. He seems to have had little, if any, education. He entered the military service in 1942. [A. 159, 161-162, 164.] Up to the time of his instant trial (when he was 41 years old), he had spent more than ten years of his life in prison. [A. 159, 162-163.] He suffered his first convictions at the age of 17—the crimes were theft and robbery—for which, on October 26, 1943, he was sentenced to prison. Later he was convicted and sent to prison for the crime that in Texas is called "murder without malice" (November 23, 1948), and robbery by assault (May 16, 1952), for which he was also sent to prison. All of the crimes were commited in Texas. [A. 35-37.]

Between terms in prison he worked for a produce company in Houston, Texas. [A. 162, 163.] Upon his release from prison in 1958 he came to California, where he worked as a chauffeur and man-servant for such people as Hon. Alfred Gitleson (a California Superior Court Judge), Peter Lawford and others. [A. 163-164.]

Second: At the conclusion of the taking of the evidence, the jury were again instructed. [A. 221-223.] They were told that, contrary to what they had been instructed in the guilt phase of the trial, the law did not forbid them from being influenced by pity for the defendants; and they could be governed "by mere sentiment and sympathy" for the defendants; but the law did forbid "mere conjecture, prejudice, public opinion or public feeling." [A. 221-222.]

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guilty so long as the death was brought about by one of them in the course of "the perpetration of or attempt to perpetrate . . . robbery . . ." [*Cal. Penal Code*, sec. 189; *People v. Boss*, 210 Cal. 245, 249, 290 Pac. 881 (1930); *People v. Washington*, 62 Cal.2d 777, 780-781, 783, 44 Cal. Rptr. 442, 445-446, 402 P.2d 130, 133-134 (1965); *People v. Machado*, 150 Cal. App. 2d 190, 193-194, 309 P.2d 903, 904-905 (1957).]

They were also told that they should consider all the evidence received throughout the whole trial, and also "all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty . . ." but, that it was "not essential to [their] decision that [they] find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand." [A. 222.]

All of the foregoing was merely preface to that part of the charge which definitively expounded to the jury the absolute and unguided power confided in them. [A. 222-223. And, see, section 1 of this Statement of the Case, p. 6, *supra.*] Nothing in it bound them in any way, in relation to choice of penalty, to measure or weigh "all the evidence" by any standard that the law may have required be met. Nothing in the charge required a finding of any particular facts, evidentiary or ultimate, as a foundation upon which to rest their choice of penalty.

During the penalty jury's deliberations, they returned to the court to ask whether a sentence of life imprisonment precluded the possibility of parole. [A. 224] The court responded by reading to them the so-called "Morse Instruction," which, in effect, told them that while a person serving a life term might or might not be paroled, the matter of parole was none of their concern in fixing the penalty at death or life imprisonment.[7] [A. 224-225]

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[7]The possibility of parole is plainly relevant to the consideration of imprisonment as a penalty. Until *People v. Morse*, 60 Cal.2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, was decided in 1964, that possibility was an appropriate subject of evidence, argument and instruction in a capital-case penalty trial. [See, *e.g.*, *People v. Friend*, 47 Cal.2d 749, 764, 306 P.2d 463, 472 (1957).] In *Morse* the State Supreme Court disapproved of that practice and, to that extent, overruled the cases permitting it. [*People v. Morse, supra*, 60 Cal.2d at 642-649, 653, 36 Cal. Rptr. at 207-212, 215, 388 P.2d at 39-44, 47.] The Court recognized, however, that a jury might very well be interested in the subject, and ask a question about it. Accordingly, the Court prepared the so-called "Morse Instruction" to be used in that event. [60 Cal.

3. California's Penalty-Imposition Procedure

First: The penalty for murder in the first degree is either death or imprisonment for life, at the discretion of the jury. [*Cal. Penal Code*, sec. 190.] As the State Supreme Court has frequently pointed out, "there is no requirement of or preference for either of the applicable penalties . . . the selection of penalty is in every instance completely within the absolute discretion of the jury . . ."; and that discretion is an unguided one, not confined or conditioned by any standards fixed by the law. [*People v. Jones*, 52 Cal. 2d 636, 649; 343 P.2d 577, 585 (1959), quoting *People v. Brice*, 49 Cal. 2d 434, 437, 317 P.2d 961, 962 (1957). To the same effect, among others, are: *People v. Hamilton*, 60 Cal. 2d 105, 134, 32 Cal. Rptr. 4, 21, 383 P. 2d 412, 429 (1963); *People v. Leary*, 105 Cal. 486, 495-496, 39 Pac. 24, 26 (1895); *People v. Friend, supra*, 47 Cal. 2d at 759, 765, 306 P. 2d at 473; *People v. Morse*, 60 Cal. 2d 631, 643, 36 Cal. Rptr. 201, 207, 388 P. 2d 33, 39 (1964); *People v. Terry*, 61 Cal. 2d 137, 141, 37 Cal. Rptr. 605, 608, 390 P.2d 381, 384 (1964); *People v. Hines*, 61 Cal. 2d 164, 173, 37 Cal. Rptr. 622, 628, 390 P.2d 398, 404 (1964); *People v. Polk*, 63 Cal. 2d 443, 451, 47 Cal. Rptr. 1, 6, 406 P.2d 641, 646 (1965); *In re Anderson*, 69 Cal. 2d 613, 622-623, 73 Cal. Rptr. 21, 27-28, 447 P.2d 117, 123-124 (1968); *People v. Nye*, 71 Cal. 2d ___, 71 Adv. Cal., 376, 389 (fn. 5) (1969).]

The jury are required, as they were told in the instant case [A. 222], to consider all the evidence. They are not, however, required to find any given fact or set of facts, as a condition to imposing one or the other of the two permitted penalties. Their discretion is absolute; and the State Supreme Court has ruled that they should never be instructed "as to how the discretion should be exercised . . ."

2d at 647-649, 36 Cal. Rptr. at 211-212, 388 P.2d at 43-44.] That instruction is another one of the standard ones used in California. [See, *California Jury Instructions, Criminal*, 3d ed., p. 260. *Cf.*, note 4, p. 6, *supra*.]

[*People v. Bollinger*, 196 Cal. 191, 207, 237 Pac. 25, 31 (1925).] They are "free to act according to [their] own judgment and discretion" [*People v. Linden*, 52 Cal. 2d 1, 25 (fn. 5), 338 P.2d 397, 409 (fn. 5) (1959)]; ". . . the law does not itself prescribe, nor authorize the court to innovate, any rule circumscribing the exercise of their discretion, but rather, commits the whole matter of its exercise to the judgment and the consciences of the jury . . ." [*People v. Friend, supra*, 47 Cal. 2d at 767, 306 P.2d at 474.]

Although two conflicting lines of authority on the matter once co-existed, it has been settled, at least since 1956, that it is not necessary, as a condition of their choice between the two penalties, that the jury find an absence of mitigating or the presence of aggravating circumstances to fix the penalty at death.[8] [*People v. Bollinger, supra*, 196 Cal. at 205-207, 237 Pac. at 30-31; *People v. Friend, supra*, 47 Cal. 2d at 755-756, 306 P.2d at 466-467; *People v. Green*, 47 Cal. 2d 209, 218, 224, 302 P.2d 307, 313-314, 317 (1956).]

The trial judge may "aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation . . ." [*People v. Polk, supra*, 63 Cal.

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[8]At one time, before adoption of the two-stage procedure, California recognized the so-called "silent verdict," so that a verdict of guilty, silent as to penalty, meant the death penalty; if the jury intended to impose life imprisonment, they had to say so in their verdict. [*People v. Welch*, 49 Cal. 174, 179-180 (1874); *People v. Green*, 47 Cal.2d 209, 221-222, 302 P.2d 307, 316 (1956).] And, as well, juries were frequently instructed, notwithstanding the Supreme Court's disapproval, "that in the absence of extenuating circumstances it was their duty to bring in a simple verdict of murder in the first degree and to 'leave with the law the responsibility of affixing the punishment.'" [*People v. Green, supra*, 47 Cal.2d at 221, 302 P.2d at 315; *People v. Bollinger, supra*, 196 Cal. at 205-209, 237 Pac. at 30-32.]

The silent-verdict practice and its associated instruction about the necessity of finding extenuation in order to impose life imprisonment, were definitely brought to an end by *Green* in 1956. The two-stage trial procedure was adopted in 1957. [California Statutes, 1957, vol. 2, chap. 1968, sec. 2, p. 3509.]

2d at 451, 47 Cal. Rptr. at 6, 406 P.2d at 646. And, *cf., People v. Friend, supra,* 47 Cal. 2d at 766-767, 306 P.2d at 473-474.] But, he is not compelled to give that aid; and, as we have seen, he cannot, in any event, circumscribe their absolute discretion or tell them how to exercise it.[9]

Second: The statute providing for separate trial of penalty [*Cal. Penal Code,* sec. 190.1] expressly prescribes the admissibility of evidence of the circumstances surrounding the crime; defendant's background and history; and any facts in aggravation or mitigation of penalty. Admittedly, this sets a broad and liberal standard of admissibility [see, *e.g., People v. Jones, supra,* 52 Cal. 2d at 647, 343 P.2d at 584]; but it is not a limitless one. Generally speaking, "the evidence must not be incompetent; it must not be irrelevant, that is, of such a nature that its prejudice to defend-

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[9]In one of the latest decisions on the subject [*People v. Nye, supra,* 71 Cal.2d ___, 71 Adv. Cal. at 388-389, 78 Cal. Rptr. at 473-474, 455 P.2d at 401-402], it was held not error to refuse an instruction that would have told the jury in considerable detail that they "may properly take into consideration factors which impel human conduct . . . the effect of human passion, ignorance and weakness . . . possible uncertainties attaching to life imprisonment as against the irrevocableness of death . . . choose between stern retribution or the exercise of pity . . . the view that . . . punishment should be fitted to the perpetrator of the crime, not merely the crime . . ." and so forth. [71 Adv. Cal. at 388 (fn. 4), 78 Cal. Rptr. at 474 (fn. 4), 455 P.2d at 402 (fn. 4).] It was not error to refuse that instruction for the reason, among others, that "a proper instruction" on the subject was given. This "proper instruction" told them to consider all the evidence of the circumstances surrounding the crime, the defendant's background and history, and of the facts in aggravation or mitigation, but that it was not essential to their decision to find mitigating circumstances on the one hand or evidence in aggravation on the other. It then concluded with California's usual statement that "[b]eyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury . . . but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and absolute discretion of the jury . . ." [71 Adv. Cal. at 389 (fn. 5), 78 Cal. Rptr. at 474 (fn. 5), 455 P.2d at 402 (fn. 5).]

ant outweighs its probative value; and it must not be directed solely to an attack upon the legality of the prior adjudication [of guilt] . . ." [*People v. Terry, supra,* 61 Cal. 2d at 144-145, 37 Cal. Rptr. at 610, 390 P.2d at 386.] Nonetheless, competent evidence that seems upon its face to be relevant and significantly material to the choice of penalty the jury have to make, is excluded; and evidence that on its face is highly prejudicial to the defendant, is admitted.[10] [*Generally,* see, *The Death Penalty Cases,* 56 Cal. Law Rev., 1268, 1406-1412 (1968); *The California Penalty Trial,* 52 California Law Review, 386 (1964).]

In the category of relevant and material evidence that is excluded come such matters as the likelihood of parole or pardon, if a life sentence is given [see, *People v. Morse, supra,* 60 Cal. 2d at 637-653, 36 Cal. Rptr., at 204-215, 388 P.2d at 36-47; *People v. Varnum,* 61 Cal. 2d 425, 428-429, 38 Cal. Rptr. 881, 882-883, 392 P.2d 961, 962-963 (1964)] and the deterrent effect of the penalty. [*People v. Ketchell,* 59 Cal. 2d 503, 536-538, 30 Cal. Rptr. 538, 556-557, 381 P.2d 394, 412-413 (1963).] On the other hand, in the category of the prejudicial but admissible, is evidence of the defendant's prior crimes—even those of which he has not been convicted.[11] [*People v. Ketchell,*

[10]For the most part, the question of what may be properly put before a jury in a penalty trial arises on appeal in the form of an objection to an instruction given or an argument made to the jury. Instructions, however [see, *People v. Turville*, 51 Cal.2d 620, 632-633, 335 P.2d 678, 685-686], and argument, as well [see, *People v. Love*, 56 Cal.2d 720, 730, 756-757, 16 Cal. Rptr. 777, 782, 17 Cal. Rptr. 481, 486-487, 366 P.2d 33, 38, 809, 814-815 (1961)], must be based on the evidence and facts judicially noticed. To exclude certain facts as a proper subject of instruction or argument, therefore, necessarily connotes inadmissibility of evidence of those facts. As was said in *People v. Love, supra*, 56 Cal.2d at 731, 16 Cal. Rptr. at 783, 366 P. 2d at 39, since the evidence is inadmissible, the argument is improper.

[11]There is a limitation on this rule, but one which does not materially hamper or deter use of such evidence—a defendant's admission or confession of another crime is inadmissible without extrinsic proof that the crime was committed. [*People v. Hines*, 61 Cal.2d 164,

supra, 59 Cal. 2d at 541-542, 30 Cal. Rptr. at 559-560, 381 P.2d at 415-416.]

Whatever may be the scope of the evidence, the jury are required to do no more than consider it [see, *People v. Howk*, 56 Cal. 2d 687, 697-699, 16 Cal. Rptr. 370, 375-376, 365 P.2d 426, 431-432 (1961)]; nothing can limit their absolute discretion to choose which of the two alternative penalties should be imposed. [See, *e.g.*, *People v. Friend*, *supra*, 47 Cal. 2d at 759-767, 306 P.2d at 469-475; *People v. Terry*, *supra*, 61 Cal. 2d at 146-147, 37 Cal. Rptr. at 611-612, 390 P.2d at 387-388; *People v. Hines*, *supra*, 61 Cal. 2d at 173, 37 Cal. Rptr. at 628, 390 P.2d at 404.]

Third: Limitation upon the range of the instructions to be given, and the argument that may permissibly be made, to the jury, follows the pattern just discussed in relation to the admission of evidence. [See, note 10, p. 13, *supra*.] The significant consideration, as we have already shown [see, section 3, subd. *First*, of this Statement of the Case], is that they need not be told in the charge anything more than that theirs is the absolute discretion to select the penalty; they are not to be told how that discretion should be exercised; nor may they be told what factors are to be considered in determining the penalty.

Argument, of course, must stay within the limits of the evidence. [*People v. Love*, *supra*, 56 Cal. 2d at 730-731, 16 Cal. Rptr. at 782-783, 17 Cal. Rptr. at 486-487, 366 P.2d at 38-39, 814-815.] The State Supreme Court has said that the objectives and the deterrent effect of punishment, and the aggravating or mitigating effect of the evidence, are proper subjects of argument to the jury. [*Peo-*

174, 37 Cal. Rptr. 622, 629, 390 P.2d 398, 405 (1964); *People v. Nye*, *supra*, 71 Adv. Cal. at 387-388, 78 Cal. Rptr. at 473, 455 P. 2d at 401]; and its commission must be proved beyond a reasonable doubt [*People v. Polk*, *supra*, 63 Cal.2d at 450, 47 Cal. Rptr. at 5-6, 406 P.2d at 645-646].

ple v. Friend, supra, 47 Cal. 2d at 766-767, 306 P.2d at 474; *People v. Green, supra,* 47 Cal. 2d at 218-224, 231, 302 P.2d at 313-317.] The present vitality of that pronouncement, however, rests in substantial doubt. Later cases, without expressly overruling or limiting *Friend* or *Green,* have held it error to permit argument or evidence as to the deterrent effect of punishment. [*People v. Love, supra,* 56 Cal. 2d at 725-726, 16 Cal. Rptr. at 779, 366 P.2d at 35; *People v. Ketchell, supra,* 59 Cal. 2d at 536-538, 30 Cal. Rptr. at 556-557, 381 P.2d at 412-413.] The cases that permitted this kind of argument did so upon a record showing that the jury were "adequately and fully instructed as to the full scope of their functions . . ." and had been told, in that respect, that the choice of penalty is "committed to their absolute discretion . . ." and that there is "no rule of law that the punishment should be death unless there is evidence of extenuation or mitigating circumstances [nor that it] shall be life imprisonment unless there is evidence in aggravation of the offense . . ." [*People v. Friend, supra,* 47 Cal. 2d at 766-767, 306 P.2d at 474. See, also, *People v. Green, supra,* 47 Cal. 2d at 218-224, 231, 302 P.2d at 313-317.]

Fourth: The jury's imposition of the death penalty is subject to only limited review, and that by the trial court in passing upon a motion for a new trial. ". . .Only the trial court has power to reduce the punishment originally selected by the trier of fact . . ." [*People v. Rittger,* 54 Cal. 2d 720, 734, 7 Cal. Rptr. 901, 909, 355 P.2d 645, 653 (1960).] When a new trial motion is made, and upon an independent review of the evidence, which it is the trial court's duty to make, the trial court, if it concludes that the jury's verdict is not supported by the weight of the evidence, may reduce the penalty to life imprisonment. [*Cal. Penal Code,* sec. 1181, subd. 7; *In re Anderson, supra,* 69 Cal. 2d at 623, 73 Cal. Rptr. at 28, 447 P.2d at 124; *People v. Love, supra,* 56 Cal. 2d at 728, 16 Cal. Rptr. at 780-781, 366 P.2d at 36-37.]

An appellate court in California, including the Supreme Court itself, has no such power; it "cannot substitute its judgment as to choice of punishment . . ." even if it "may doubt the appropriateness of the death penalty" in the case before it.[12] [*People v. Linden, supra,* 52 Cal. 2d at 26, 338 P.2d at 410. To the same effect are: *People v. Green, supra,* 47 Cal. 2d at 235, 302 P.2d at 324-325; *People v. Morse, supra,* 60 Cal. 2d at 650, 36 Cal. Rptr. at 212, 338 P.2d at 44; *People v. Love, supra,* 56 Cal. 2d at 727-728, 16 Cal. Rptr. at 780-781, 366 P.2d at 36-37.] The Supreme Court "has uniformly rejected requests to reduce the penalty from death to life imprisonment . . ." [*People v. Lookadoo, supra,* 66 Cal. 2d at 327, 57 Cal. Rptr. at 621, 425 P.2d at 221.] Of course, if there is error of law involved, the appellate court may reverse; but "it cannot correct the error by reducing the punishment, but must reverse and remand the question to the trier of fact . . . It is only the trial court which is empowered to reduce the degree or class of offense based on its view of the weight of the evidence . . ." [*People v. Linden, supra,* 52 Cal. 2d at 27, 338 P.2d at 410. See, also, *People v. Borchers,* 50 Cal. 2d 321, 330, 325 P.2d 97, 101 (1958).]

Both trial and appellate courts, when the verdict is "contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein . . . may modify the verdict, finding or judgment accordingly . . ." [*Cal. Penal Code,* sec. 1181, subd. 6.] As the quoted language would lead one to expect, the power may not be exercised

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[12]This seems to be an anomalous result, because the statutory provision that empowers the trial court to reduce the penalty, also provides that "this power shall extend to any court to which the case may be appealed." [*Cal. Penal Code*, sec. 1181, subd. 7.] The anomaly is explained by the Supreme Court as a necessary one, "because under the pertinent statutes as construed by this court the trier of fact is vested with exclusive discretion to determine punishment . . ." [*People v. Green, supra,* 47 Cal.2d at 235, 302 P.2d at 324-325.]

to reduce a verdict of murder in the first degree to second degree, even though it may appear to the appellate court that only a second-degree murder was committed, "if there is evidence of and the trier of fact finds first degree murder . . ." [*People v. Linden, supra,* 52 Cal. 2d at 26, 338 P.2d at 410.]

4. Review of the Penalty.

McGautha made and the trial court denied a motion for a reduction of sentence and for a new trial. [A. 239, 243.] On appeal to the State Supreme Court the judgment of death was affirmed. [A. 248, 265.] The question here presented was raised by petitioner in the Supreme Court; it was expressly decided in favor of the constitutionality of the standardless death-penalty procedure, on the authority of *In re Anderson, supra,* 69 Cal. 2d 613, 73 Cal. Rptr. 21, 447 P.2d 117.[13] [A. 265] A petition for rehearing was denied; and the instant certiorari proceedings ensued.

SUMMARY OF THE ARGUMENT

The penalty for murder in the first degree in California is not fixed by the law. The determination whether in any given case it shall be death or life imprisonment is confided to the jury, in its absolute discretion. The law provides no standards or guidelines by which the jury are to determine which of the two penalties should be imposed. They need not be instructed as to what are the legal considerations that should be taken into account when deciding whether

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[13] *Anderson* was decided, by a 4-3 division of the Court, in favor of constitutionality of the procedure. A comprehensive discussion of our immediate problem is to be found in it, especially in the dissenting opinion of Mr. Justice Tobriner, in which then Mr. Chief Justice Traynor and Mr. Justice Peters concurred [69 Cal.2d at 635-669, 73 Cal. Rptr. at 36-59, 447 P.2d at 132-155.] We respectfully suggest examination of that opinion as an elaboration of and supplement to the argument we have made.

the penalty should be death or life imprisonment. That is so, because the law does not provide any such considerations, but leaves the decision to the absolute and unguided discretion of the jury. Accordingly, a jury faced with the ordeal of making that decision need only be told, and in the case at bar it was only told, that in determining which punishment should be inflicted, they were "entirely free to act according to [their] own judgment, conscience and absolute discretion . . ."; and that "the law itself provides no standard for the guidance of the jury in the selection of the penalty . . ." So instructed in the instant case, which involved two men jointly committing and equally guilty of a murder, the jury chose life imprisonment for one of them, and death for the other, the petitioner here. Because of the absolute discretion vested in the jury to choose the penalty, their choice is unreviewable on appeal in the State courts.

Inherent in this procedure, and necessarily permitted by it, is the choice of penalty for reasons that are or may be discriminatory, irrational, arbitrary or otherwise constitutionally impermissible. It provides no assurance–it is the law, not judicial grace, which must provide the assurance–that the penalty decision will be reached on valid grounds and by application of a standard that is applicable to all and thus will achieve or tend to achieve substantial equality of treatment of those similarly situated. And, because of the absolute nature of the jury's statutory power and the absence of any standard imposed by law, there is no way of reviewing the jury's exercise of its discretion for abusive departure from the law's standard.

The determination reached in the instant case to put petitioner to death, while sparing his co-defendant, and the statutorily authorized procedure by which the determination was brought about, denied petitioner due process of law. It did so, because basic to the whole notion of due process is the principle that a man's life or liberty shall not be taken save in accordance with certain and ascertainable

standards fixed by the law. It is not enough in that regard that a statute may be sufficiently certain to inform one of what is or is not prohibited in the way of his own conduct. It is also necessary that it be certain enough to guide courts in the making of the determinations of guilt and punishment that are inherent in the process of adjudicating a charge that the prohibited act has been committed. In this regard, fixing of the penalty cannot be rationally differentiated from determination of guilt; in either event it is the defendant's life or liberty that is at hazard.

The California procedure is substantively different from other systems of imposing the death penalty—*e.g.*, one where, the offense being certainly defined, a specified penalty is required to be imposed upon the person found guilty of that offense; or, one where that penalty must be imposed, except when the jury recommends mercy. Decision that California's procedure is unconstitutional, therefore, does not mean, or require that it be decided that the death penalty *per se* is. Nor does it mean or require that jury-determination of penalty be proscribed. It means only that when the choice of penalty is not fixed by the law, but is left to the jury's discretion, standards to guide appropriate exercise of that discretion must be provided. The provision of such standards is an attainable objective, as the work of the American Law Institute in its Model Penal Code, and other similar studies, show.

ARGUMENT

I

CALIFORNIA'S PROCEDURE, BY WHICH THE DEATH PENALTY IS IMPOSED, DENIED PETITIONER DUE PROCESS OF LAW, FOR IT SUBJECTED HIM TO THE EXTREME PENALTY AS THE RESULT OF A CHOICE NOT REQUIRED TO CONFORM TO STANDARDS FIXED BY THE LAW, BUT WHICH WAS PERMITTED BY THE STATE TO BE MADE IN RESPONSE TO THE UNGUIDED AND UNRESTRAINED SUBJECTIVE REACTIONS OR EMOTIONS OF A JURY.

First: The procedure we have described, by which petitioner McGautha was sentenced to death, raises squarely the question to which the writ of certiorari was directed—whether he was denied due process of law by leaving to the jury, at its absolute and unguided discretion, the choice whether to send him to his death or to imprison him for life. It is our submission that the procedure did deny him due process of law, precisely because of its standardless or unprincipled operation.

". . . Certainly one of the basic purposes of the Due Process Clause," this Court has said, "has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in the constitutional safeguard [of the Fourteenth Amendment] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce . . ." [*Giaccio v. Pennsylvania*, 382 U. S. 399, 403 (1966).[14]] The phrase "laws

[14]We are aware of the debate that has gone on over the meaning of this Court's footnote 8 in *Giaccio, supra*, 382 U.S. at 405, where it is said that in holding as it did, the court intended "to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Having regard to this Court's practice of not deciding serious constitutional questions when it is not inescapably necessary to do so—a practice

of the land" in this quotation from *Giaccio*, is, of course, reminiscent of Magna Carta. The use of it is significant, for, as it appears in the Great Charter, and as it was used in *Giaccio*, it connotes ascertainable standards, fixed by law, as a condition upon the deprivation of a man's life, liberty or property.[15] This Court, on more than one occasion, has assimilated "due process of law" to the "law of the land" of Magna Carta. [*Davidson v. New Orleans*, 96 U. S. 97, 101 (1878); *Den* ex dem. *Murray v. Hoboken Land & Imp. Co.*, 18 How. 272, 276 (1855); *Bartkus v. Illinois*, 359 U. S. 121, 126-127 (1959); *Hurtado v. California*, 110 U. S. 516, 532 (1884); *Twining v. New Jersey*, 211 U. S. 78, 100

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which, the Court has said, it has followed "[f]rom a very early date" [*Peters v. Hobby*, 349 U.S. 331, 338 (1955)]—it is not to be supposed that in this almost offhand manner, and in a case in which the question was not involved, the Court intended to forestall plenary consideration, on a proper occasion, of the serious question of constitutional law that is raised by the standardless death penalty procedure. Rather, and especially because that question was not involved in the case, it would seem to be more likely that care was being taken not to intimate an opinion one way or the other upon it, but to leave it for appropriate consideration when it arose in a context requiring that it be decided. Certainly, nothing in the footnote limited or qualified in any way the basic principle of the Due Process Clause which was expounded and applied in the case.

[15]The phrase is found in the 39th Article, which reads as follows:

> "39. No freeman shall be taken, or imprisoned, or disseised or outlawed or banished, or in any way destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers or by the law of the land." [*Magna Carta*, art. 39, West's California Annotated Codes, Constitution, vol. 3, p. 764.]

The apposition of the phrases "lawful judgment of his peers" and "law of the land," connotes the requirement that, as a condition of the taking, imprisonment or destruction of a freeman, or other condemnation for which a "lawful judgment" may be passed, there must be pre-existing law.

(1908).[16] See, also, *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968), Black and Douglas, JJ., concurring; *Louisiana v. Resweber*, 329 U. S. 459, 467 (1947), Frankfurter, J., concurring.]

Thus, it follows that, before one may be deprived of his life or liberty, the law itself must fix the standards from which a judgment of deprivation may be rationally derived, and by which the propriety of that judgment may be tested. If judgment without guidance from such standards is permissible, what is done is not to determine the defendant's fate by the law of the land, but to leave it to the *ad hoc* determination of the particular jury before whom the case chances to come. That is not due process of law, but whim or caprice; it is no more than "the arbitrary exercise of government unrestrained by the established principles of private right and distributive justice." [See, *Hurtado v. California, supra*, 110 U. S. at 527.]

This requirement of standards is not met by the discretionary power the trial judge has to "aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation." [*People v. Polk, supra*, 63 Cal. 2d at 451, 47 Cal. Rptr. at 6, 406 P.2d at 641.] The judge need not give any such aid; and, if, as a matter of grace or discretion he essays to give it, the law does not tell him, any more than he can tell the jury, what "kinds of factors" are to be considered. In any event, it is the "law itself [that] must save the parties' rights, and not leave them to the discretion of the courts as such . . ." [*Louisville and N.R.R. Co. v. Central Stock Yards*, 212 U. S. 132, 143-144 (1909); it is the statute that must secure the defendant's rights, not merely the court as a matter of discretionary or gracious choice. [See, *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424-425 (1915).]

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[16]So far as the precise holding of *Twining* is concerned—that the Fourteenth Amendment does not apply, as against a State, the Fifth Amendment privilege against testimonial compulsion—it has been overruled. [See, *Malloy v. Hogan*, 378 U.S. 1, 2, 6 (1964).]

Second: It is not enough that a criminal statute be "sufficiently definite to give notice of the required conduct to one who would avoid its penalties . . ."; it must also "guide the judge in its application and a lawyer in defending one charged with its violation" [*Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)]; or, as this Court also put it in *Musser v. Utah*, 333 U. S. 95, 97 (1948), "[l]egislation may run afoul of the Due Process Clause because it fails to give adequate guidelines . . . to guide courts in trying those who are accused . . ." The Court of Appeals for the District of Columbia Circuit has put the matter cogently: ". . . 'a law fails to meet the requirements of the Due Process Clause' not only 'if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits,' but also if it 'leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.'" [*Ricks v. District of Columbia*, D. C. Cir., 414 F.2d 1077, 1101 (1968).]

It is settled that a statute could not constitutionally be so vague as to permit every jury to become a legislature *ad hoc*, formulating its own but unascertainable standards for the occasion of the case in which it sits. [See, *Herndon v. Lowry*, 301 U. S. 242, 262 (1937); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).] No one, therefore, could reasonably quarrel with the proposition "that due process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result . . ." [See, *Note*, 62 Harvard Law Rev., 77 (1948).] Taking that as a premise, it follows "that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application." [*Ibid.*]

Of course, this is void-for-vagueness doctrine; but the cases that apply the doctrine have noted this dual aspect of it. It is not only that the crime must be so certainly de-

fined that the statute gives "adequate guidance to those who would be law abiding . . ." and advises "defendants of the nature of the offense with which they are charged . . ."; it is also necessary, if the statute is not to "run afoul of the Due Process Clause . . . [that it] guide courts in trying those who are accused."[17] [*Musser v. Utah, supra,* 333 U. S. at 97.] No doubt, in California the crime of murder is defined with sufficient certainty to give the guidance "to those who would be law abiding" that the Due Process Clause requires. No doubt, too, the meaning of "death" and "life imprisonment" in the statutory context is clear enough to inform those concerned of what is meant. The statute's deficiency is that it does not itself fix a penalty, and does not tell those to whom that power is given, when and in what circumstances the one penalty rather than the other should be chosen.

If "the jury must take instruction from the court, at least the trial court must be possessed of the means of knowing with sufficient definiteness the range of 'rights' that are 'constitutional'. . ."—in our case, the range of considerations bearing on the choice of penalty that are constitutionally permissible. [See, *Screws v. United States,* 325 U.S. 91, 151-152 (1945), Roberts, Frankfurter and Jackson, JJ., dissenting.] So, if, as the cases cited show, standards are necessary to guide courts in deciding who is or is not guilty of the defined crime, they are equally necessary to guide them in deciding what is to be done to or with those found guilty. In either aspect of the adjudica-

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[17]To the same general effect are: *Giaccio v. Pennsylvania, supra,* 382 U.S. at 402-403—". . . a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or* leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case . . ." (Italics ours); *Boyce Motor Lines v. United States, supra,* 342 U.S. at 340; *Wright v. City of Montgomery, Alabama,* 5 Cir., 406 F.2d 867, 871-872 (1968); *Ricks v. District of Columbia, supra,* 414 F.2d at 1100-1102; *Goldman v. Knecht,* D. Colo. (3-judge court), 295 F. Supp. 897, 903-906 (1969).

tory process, the absence of standards "licenses the jury [or court] to create its own standard in each case . . ." [*Herndon v. Lowry, supra,* 301 U. S. at 263 (1937); *Goldman v. Knecht, supra,* 295 F. Supp. at 904.] That is the "open invitation . . . to virtually unrestrained administration" of the law [see, *Ricks v. District of Columbia, supra,* 414 F.2d at 1101] that the cases condemn as violative of the Due Process Clause.

The sentencing process is not, of course, outside the limitations imposed upon courts by the Due Process Clause. [See, *e.g., Townsend v. Burke,* 334 U.S. 736, 740 (1948); *Witherspoon v. Illinois,* 391 U.S. 510, 522, fn. 5 (1968).] And there is the same necessity for standards, and for the same ultimate reason, to guide the courts in determining which of two otherwise unfixed penalties should be imposed, as there is for standards to guide them in the determination of guilt. [*Cf., United States v. Evans,* 333 U.S. 483, 485-486 (1948).] In either event it is the defendant's life or liberty that is at stake. [See, 62 Harvard Law Review, *supra,* at 78.]

Third: This very case illustrates the capricious and arbitrary way in which the standardless death-penalty procedure may and is permitted by the State of California to work. Of two men, equally guilty and jointly tried, only one has been selected by the jury to be put to death. There may have been a constitutionally permissible reason for that discrimination; there may have been an impermissible one; there may have been no articulable reason at all. We do not know; we can only guess. But the vice of the procedure goes beyond the range of arbitrariness or irrationality that it permits; in a due process sense, it is also defective because it requires no reason at all. As the State Supreme Court has said, the consideration that determines the jury's choice may be anything that "appears to them to be important" [*People v. Friend, supra,* 47 Cal. 2d at 768, 306 P.2d at 474-475—and this, without any "guidelines, standards or criteria" by which to evaluate that importance or to determine its relevance to the objects of the criminal law.

[See, *e.g.*, *People v. Morse, supra,* 60 Cal. 2d at 643, 36 Cal. Rptr. at 208, 388 P.2d at 40.] Indeed, the State Supreme Court has also said that "it is within [the jury's] discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness . . ." and others of this sort, which a jury might be likely to take into account. [*People v. Friend, supra,* 47 Cal. 2d at 768, 306 P.2d at 474-475.] Thus, the procedure, by the authority of the State's law, permits the jury, in case after case, as it did in the case at bar, to doom one man to death, while saving another, for reasons that are unascertainable. Those reasons are, in any event, unreviewable, because there is no law-prescribed standard by which to weigh or measure them, even if they are ascertained. [See, cases cited, *Statement of the Case,* sec. 3 subd. *First, supra.*] For all that we know, the reasons that moved McGautha's jury may have been constitutionally impermissible ones. Even if they were, the result based on them is unimpeachable, so far as California law is concerned.

That is the reality of the standardless death penalty procedure; it reveals the uncontrolled potential in it for arbitrary and unprincipled operation against persons to whom the Due Process Clause guarantees a reasoned and equal application of the law. It reaches its result, not on the basis of and in conformity with fixed standards of the law, but in accordance with the subjective and unrestrained reactions of the individual members of a jury acting *pro hac vice.* [See, *e.g.*, *Note,* 24 Virginia Law Review, 462, 464-465 (1938); C. Kerr, *A Needed Reform in Criminal Procedure,* 6 Kentucky Law Review, 107, 108-110 (1918).] Due process of law means something more than notice and an opportunity to be heard. That minimal requirement is meaningless if it does not lead to judgment pronounced only in conformity to ascertainable standards fixed by the

law. [See, 62 Harvard Law Review, *supra*, at 78.] That is the great principle which lies at the heart of the Due Process Clause, and against which the standardless death penalty procedure offends—the principle that no man shall be deprived of his life save by the law of the land.

Fourth: Rational standards by which to guide the choice between death and life imprisonment are capable of formulation by the policy-making branches of Government. A specific set of standards has been worked out by the American Law Institute in its Model Penal Code, sec. 210.6 (May 14, 1962).[18] A reasoned formulation along the same lines, suggested for the State of Pennsylvania, will be found in 108 U. Pa. Law Review, 434, 445-448 (1960). These show that the job can be done.

It is, of course, no part of petitioner's burden in this review to formulate or suggest acceptable standards.[19] The

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[18]The general scheme of the Code is that the lesser penalty will be imposed if none of the enumerated aggravating circumstances is shown; or substantial mitigating circumstances established by the evidence call for leniency, or the defendant is under the age of 18 years, or his physical or mental condition calls for leniency, or, even though the evidence suffices to sustain the verdict of guilt, it does not foreclose all doubt respecting the defendant's guilt. The jury is given a wide discretion, but it may not impose the dealth penalty unless it finds one of the enumerated aggravating circumstances and that there are no mitigating circumstances sufficiently substantial to call for leniency. Aggravating and mitigating circumstances, respectively, are categorized and enumerated with fair specificity.

[19]A general suggestion may nevertheless be ventured. There is, modernly, pretty general agreement upon the objects of punishment—they are, not alone or at all retribution, but deterrence, rehabilitation, and protection of society generally. [See, *e.g., People v. Friend, supra*, 47 Cal.2d at 766 (fn. 8), 306 P.2d at 474 (fn. 8); *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963), Goldberg, Douglas, Brennan, JJ., dissenting.] Consideration of the choice of penalty could be centered around these objectives, with a view of choosing that one which, having regard to the circumstances of the case and the character and temperament of the defendant, would most nearly further rather than frustrate them.

purpose of adverting to the matter is only to show that the argument based on the absence of standards is not an abstraction, but one which points at a defect in the California procedure which is remediable. The procedure, therefore, is not defensible as the most or best that can be done in actual practice.

The jury's function in penalty determination is quite different in kind from their usual fact-finding function. [See, *Witherspoon v. Illinois, supra,* 391 U.S. at 522 (fn. 20); *In re Anderson, supra,* 69 Cal. 2d at 641, 73 Cal. Rptr. at 39-40, 447 P.2d at 135-136 (dissenting opinion).] It is more akin to the legislative function of prescribing the penalty for the crimes defined by statute. That kind of function involves consideration of basic policies of punishment and the public purpose to be achieved. Since the jury are given a legislative function, they should also be guided toward the considerations of policy they ought in fairness and reason take into the reckoning.

No doubt, the job of formulation would not be an easy one. But a policy-making branch of government, suitably informed by the relevant scientific disciplines, should be equal to the job. To hold that the Constitution requires the formulation and application of standards would not, therefore, be to require the unattainable or the impractical. The case is substantively different from one—say the putting of a monetary value on pain and suffering from a wrongfully inflicted personal injury—where there is no practical standard that can be devised [see, 7 Wigmore, Evidence (3d ed. 1940). p. 55. § 1944] and where, therefore, the law

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In its *Standards Relating To Sentencing Alternatives and Procedures,* sec. 2.2, the American Bar Association Project on Minimum Standards of Criminal Justice takes a similar approach to discretionary sentencing generally. (The death penalty is not included, because no position on retention of that penalty is taken.) It is there said that the sentence "should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

does the best it can by permitting the jury, subject to review for abuse, to make a rough and, perhaps, arbitrary approximation. [See, *e.g.*, *Beagle v. Vasold*, 65 Cal. 2d 166, 172, 179-180, 53 Cal. Rptr. 129, 136-137, 417 P. 2d 673, 680-681 (1966).]

II

CALIFORNIA'S PROCEDURE, IN RESPECT TO ITS VULNERABILITY TO THE REQUIREMENTS OF DUE PROCESS, IS MATERIALLY DIFFERENT FROM A PROCEDURE WHEREBY THE PENALTY IS CERTAINLY IMPOSED BY LAW.

The foregoing argument is directed at demonstrating the unconstitutionality of the California death-penalty procedure, as it now exists and is applied. For the purposes of this case we need not go beyond that relatively limited objective. Accordingly, it may serve to concentrate attention upon and emphasize the argument if we state what we need not argue.

First: We need not argue that the death penalty *per se* is unconstitutional.[20] All that we need to argue is that when

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[20]A survey of the death-penalty statutes then (1948) in force in the United States is found in the concurring opinion of Mr. Justice Frankfurter in *Andres v. United States*, 333 U.S. 740, 757, 767 (1948). The situation as of the present time is not significantly different. [See, *e.g.*, 83 Harvard Law Review 1773, 1781 (1970); 51 Journal of Criminal Law, Criminology and Police Science, 317 (fn. 5).] A survey of the statutes of all of the States, made for the purposes of this brief, shows, however, there are now eleven states which have abolished the death penalty (including Vermont, which has done so for first offenders only [Vt. Stat. Ann., tit. 13, §2303 (1958), amended 1965, No. 30 (1969 Cum. Pocket Part)], and excluding Delaware, which, having abolished the extreme penalty in 1960, restored it a year later [53 Del. Laws, ch. 310, §2]).

The statutes appear to be of three general types. First, are those mandatorily fixing the penalty at death upon conviction of a specified crime. [See, *e.g.*, note 2, p. 4, *supra*.] Second, are those fixing the penalty at death, but giving the jury that finds guilt the power to dispense or recommend mercy [see, *e.g.*, subdivision *Third*, *infra*]; and

the law itself does not impose the penalty, but leaves it to the trier of fact to choose between it and a lesser punishment, the law must guide the choice by rational standards that will tend to lead to the appropriate decision in the particular circumstances of the case.

Of course, the California procedure necessarily falls if the death penalty, as such, is unconstitutional under the Due Process Clause, *ex proprio vigore*, or because of the application to the States through that Clause of the standards of the Eighth Amendment.[21] [See, *Robinson v. California*, 370 U.S. 660, 666, 675 (1962).] We do not reject this position as one of the due process arguments fairly included within

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third, those, like California's, that fix no penalty, but leave it to the jury to fix it. [Generally, see, R. Knowlton, *Problems of Jury Discretion In Capital Cases*, 101 U. Pa. Law Rev. 1099, 1101-1102 (1953).] Mr. Justice Frankfurter's summation of his survey of the statutes was that "most of the States which have retained the death sentence have entrusted the jury with remission of the death sentence, although sentencing is traditionally the court's function, and this is true even in those States where the legislature has not in so many words put this power in the jury's keeping . . ." [*Andres v. United States, supra*, 333 U.S. at 759.] No doubt the existence of such statutes is "worth considering," but the "fact that a practice . . . is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . ." [*Leland v. Oregon*, 343 U.S. 790, 798 (1952).]

[21]The trend of opinion seems to be quite markedly in that direction. One of the latest expositions of the subject is that of ex-Justice Goldberg and Alan M. Dershowitz in *Declaring The Death Penalty Unconstitutional*, 83 Harvard Law Review, 1773 (1970). [Also, *cf.*, Goldberg, Douglas and Brennan, JJ., dissenting from the denial of certiorari in *Rudolph v. Alabama, supra*, 375 U.S. 889.] So far, that result has not been reached by any court of which we are aware; and the indications of those decisions in which the question has been discussed, though not, perhaps, their precise holdings, have been to the contrary. [See, *e.g.*, *Trop v. Dulles*, 356 U.S. 86, 99-100, 111 (1958); *Ex parte Kemmler*, 136 U.S. 436, 444-448 (1889); *Maxwell v. Bishop*, 8 Cir., 398 F.2d 138, 145-149 (1968), *vacated* on other grounds ___ U.S. ___, 90 S. Ct. 1578 (1970); *Sims v. Eyman*, 9 Cir., 405 F.2d 439, 447-448 (1969).]

the scope of the question here presented; but we do not elaborate upon it, because, first, it has been twice argued and massively briefed before this Court in the two immediately preceding terms [*Maxwell v. Bishop*, No. 13, O.T. 1969], so that to elaborate would be unnecessary repetition; and, second, holding the death penalty *per se* to be unconstitutional is not a necessary premise of the narrower argument we make. The specific question here, and our explication of it, go to the constitutionality of the procedure by which the death penalty is imposed in California. The broader question of the constitutionality of the penalty itself may, but it need not, be reached in the case at bar as a premise of the result we advocate—for that result does not depend upon the unconstitutionality of the death penalty as such, but upon the necessity for standards to guide those who must decide whether to impose it. Such a result is wholly consonant with the supposition that the death penalty is or will be held to be a constitutional mode of punishment. All that the result we seek will do is to require that what is, *ex hypothesi*, a constitutional penalty, be imposed pursuant to a constitutional procedure.[22]

Second: On the hypothesis just indicated, the mandatory death penalty for crimes of such gravity that imposition of it is not so disproportionate as to offend against the Eighth Amendment [see, *Jackson v. Bishop*, 8 Cir., 404 F.2d 571, 579 (1968); and *cf.*, *Trop v. Dulles, supra*, 356 U.S. at 99-100, 111 (1958); *Weems v. United States*, 217 U.S. 349, 366-367 (1910)] would not be affected. The standards for imposition of the mandatory penalty are legislatively fixed by defining the crime. The penalty necessarily follows

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[22]The requirement of standards would not press down a pattern of uniformity upon the States. [*Cf.*, Burger, C.J., and Harlan, J., separately dissenting in *Baldwin v. New York*, ___ U.S. ___, ___ (1970).] The range of acceptable standards is wide, and so far as anything that needs to be decided at bar is concerned, the States are free to choose within the broad limits of the Due Process Clause.

from the fact-trier's determination that the crime, so defined, has been committed [*cf., Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); and see, *Trop v. Dulles, supra*, 356 U.S. at 99; *Ex parte Kemmler, supra*, 136 U.S. at 444-448; *Sims v. Eyman, supra*, 405 F.2d at 447-448.] Decision at bar along the lines we urge will add only the requirement that where the penalty is not fixed by the law, but is left to the discretion of the fact trier, standards to guide the exercise of discretion must be provided.

Third: Statutes that impose the death penalty for a defined or specified crime, but give to the jury or court a dispensing power of mercy [see, *e.g.*, the Arkansas statute involved in *Maxwell v. Bishop, supra*, 398 F.2d 138, are not necessarily affected by acceptance of the proposition we urge here. Such statutes are quite different from California's. Under them, as the Court of Appeals noted in *Maxwell, supra*, 398 F.2d at 149, "the basic punishment is death . . . The life imprisonment alternative . . . [i]n operation gave the Arkansas jury the power to alleviate punishment and extend clemency . . . where death had been the only punishment theretofore prescribed . . ." So, when as happened in Maxwell's case, the jury did not exercise its option of clemency, the penalty, certainly fixed by the law, was death. [See, *Maxwell v. Bishop, supra*, 398 F.2d at 139.] The Arkansas cases support that interpretation of the statute involved in *Maxwell*. [*Kelley v. State*, 133 Ark. 261, 276-277, 202 S.W. 49, 54 (1918). See, also, *Hawthorne v. State*, 135 Ark. 247, 250-251, 204 S.W. 841, 842-843 (1918); *Clark v. State*, 169 Ark. 717, 729, 276 S.W. 849, 853-854 (1925); *Stewart v. State*, 233 Ark. 458, 462, 345 S.W.2d 472, 475 (1961).]

Under the California statute, however, the jury, not the law, fixes the penalty [see, *People v. Green, supra*, 47 Cal. 2d at 224, 302 P.2d at 317]; the law has no preference between the two alternative penalties, and fixes neither as the one to be imposed. In fact, in California, there is no penalty fixed for one convicted of murder in the first degree,

until the jury affirmatively fixes it; there is no longer the law-imposed penalty of death effected by a verdict of guilt which is silent as to penalty. [See, *Statement of the Case*, sec. 3, subd. *First*, *supra*.] The vast difference between the California statute and one like the Arkansas act is strikingly illustrated by the silent verdict. In Arkansas it means death [*e.g.*, *Kelley v. State*, *supra*, 133 Ark. at 276-277, 202 S.W. at 54]; in California it means no penalty at all has yet been imposed. [*Cal. Penal Code*, sec. 190.1. And, see, note 8, p. 11, *supra*.]

A statute that gives the court or jury the power to dispense mercy, but, absent exercise of that power, certainly fixes an otherwise constitutional penalty, may, perhaps, be invulnerable to the constitutional challenge we make against the California procedure. Conceivably, it is arguable that there is no constitutional right to an extension of mercy or grace, so one cannot complain on constitutional grounds of a statute that extends to him the gracious chance of a lesser penalty than the one to which, absent that act of grace, he is lawfully subject. Whether that is or is not a good ground of decision upon which to uphold a statute such as the one typified by the Arkansas legislation, is a question that need not be decided in the instant cause. The statute here involved is so much different in its purport and operation as to make resolution of that question unnecessary.[23]

[23]We are aware that it has been argued before this Court that the Arkansas statute, even if it was of the mercy-dispensation type, was nonetheless subject to the constitutional requirement of standards. [See, Brief for Petitioner, pp. 24-27 in *Maxwell v. Bishop*, No. 13, O.T. 1969.] The Court of Appeals, stating that the basic punishment under the statute was death, disagreed with the defendant's argument. [See, *Maxwell v. Bishop*, *supra*, 398 F.2d at 149.] We need not enter the debate whether a statute authorizing dispensation of clemency must provide standards by which such dispensation is to be governed. There is a pronounced difference between, on the one hand, a statute that certainly fixes the penalty to be imposed, and which penalty becomes operative, without more, upon a finding of guilt, unless mercy is extended, and, on the other hand, a statute that fixes no penalty at all, but leaves that critical decision to the absolute and unguided discretion of a lay jury. That difference leaves ample room for differentiation of the two cases.

III

THE UNCONSTITUTIONALITY OF THE PRESENT CAPITAL SENTENCING PROCEDURE IN CALIFORNIA REQUIRES RECONSIDERATION BY THE STATE COURT TO DETERMINE WHETHER A CONSTITUTIONAL PROCEDURE IS AVAILABLE AND APPLICABLE TO PETITIONER.

If the California jury-sentencing procedure of Penal Code, sec. 190.1 is unconstitutional, it necessarily follows that the judgment, insofar as it purports to impose the death penalty, cannot stand. The only statutory provision for sentencing is that found in section 190.1. This is not a case in which the trial judge has the power to impose a life sentence under that section, because the statutory contingency that energizes the power is only the inability of the penalty jury "to reach a unanimous verdict on the issue of penalty . . ." [*Cal. Penal Code*, sec. 190.1.] Conceivably, therefore, the case is one in which no valid law under which a sentence can be imposed exists. In a similar situation this Court has reversed the judgment and ordered the proceedings dismissed. [*Weems v. United States, supra*, 217 U. S. at 382.]

On the other hand, it is also conceivable that faced with the situation that in the present state of the California statute, no sentence can be constitutionally imposed by a jury, the California Supreme Court, as a matter of construction of section 190.1 or of the State's common law, may hold that the trial judge is authorized or required to impose a life sentence. Obviously this, at least in the first instance, is a matter for the State court. [*Cf., Maxwell v. Bishop, supra*, ___ U.S. ___ 90 S.Ct. 1578, 1581 (1970).] What is clear, at this juncture, is that, unless the procedure by which it was imposed was a valid one, the present penalty judgment must be gotten out of the way.[24]

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[24]Petitioner was charged and convicted of one count of murder in the first degree and two counts of armed robbery. [A. 1-3, 32-33.] On the latter two counts he was sentenced to the term prescribed by law [A. 32], *i.e.*, 15 years to life imprisonment. [*Cal. Penal Code*,

Conclusion

The judgment ordering that petitioner be put to death should be vacated and the cause remanded with directions to reconsider the issue of penalty in the light of this Court's opinion and, if it is then determined that there is no existing procedure by which the petitioner may be constitutionally sentenced, to dismiss the count of the information charging petitioner with murder.

Respectfully submitted,

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sec. 213.] Conformably to California's Indeterminate Sentence Law [*Cal. Penal Code*, Part 3, Title 1, Chaps. 7, 8, commencing with section 2900] he will be eligible for parole upon having served seven years; and so, the exact period of confinement will be determined in due course by the Adult Authority. [*Cal. Penal Code*, secs. 1168, 2940, 3020, 3040, 3046, 5077.] If the term is not so determined by the Authority, the term that must be served is the maximum. [*Cal. Penal Code*, sec. 2940.]